Supreme Court, U.S.
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No. 01-___

In the Supreme Court of the United States

GERALD W. WEAVER, II
Petitioner
vs.
UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Dated: February 15, 2002

QUESTION PRESENTED

Whether a guilty plea that was entered pursuant to a negotiated agreement with the government should be permitted to be withdrawn when defense counsel's subsequent conflict of interest impaired or vitiated the agreement.

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DECISIONS BELOW

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These decisions are reproduced in the Appendix hereto at pp. A-1 and A-9.

BASIS FOR JURISDICTION

The decision of the court of appeals was entered October 5, 2001. Orders denying rehearing and rehearing *en banc* were entered November 19, 2001.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). The Petition is timely under Rule 13.1 of the Rules of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

U.S. CONST., AMEND. VI:

In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

18 U.S.C. § 3553(e):

(e) Limited authority to impose a sentence below a statutory minimum.—Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such a sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

FEDERAL RULES OF CRIMINAL PROCEDURE, Rule 35(b):

(b) Reduction of Sentence for Substantial Assistance. If the Government so moves within one year after the sentence is imposed, the court may reduce a sentence to reflect a defendant's subsequent substantial assistance in investigating or prosecuting another person, in accordance with the guidelines and policy statements

issued by the Sentencing Commission under 28 U.S.C. § 994. The court may consider a government motion to reduce a sentence made one year or more after the sentence is imposed if the defendant's substantial assistance involves information or evidence not known by the defendant until one year or more after sentence is imposed. In evaluating whether substantial assistance has been rendered, the court may consider the defendant's pre-sentence assistance. In applying this subdivision, the court may reduce the sentence to a level below that established by statute as a minimum sentence.

FEDERAL RULES OF CRIMINAL PROCEDURE, Rule 44(c):

(c) Joint Representation. Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

STATEMENT OF THE CASE

On November 22, 1992, Petitioner Gerald W. Weaver, II, was indicted in the U. S. District Court for the District of Columbia. A superseding indictment was returned on February 16, 1993. It contained 22 counts, all but one arising from the U. S. House of Representatives Post Office scandal. (Crim. No. 92-453) On March 31, 1993, Petitioner entered a guilty plea before District Judge Norma H. Johnson to obstruction of justice, 18 U.S.C. § 1503, conspiracy to distribute cocaine, 21 U.S.C. § 846, and distribution of cocaine, 21 U.S.C. § 841, pursuant to a negotiated agreement with the United States. Under the agreement, Petitioner promised to cooperate in ongoing Post Office investigations, and the government promised to consider filing, within one year of Petitioner's initial sentencing, a "substantial assistance" motion pursuant to Fed.R.Crim.P. 35(b) and 18 U.S.C. § 3553(e) to reduce his sentence.

Petitioner retained new counsel, R. Kenneth Mundy, for sentencing; and on June 30, 1993, Petitioner was initially sentenced to a term of incarceration of 24 months on each count to be served concurrently, followed by 36 months of supervised release. The government did not file a substantial assistance motion before the initial sentencing.

On July 5, 1994, Mr. Mundy then entered an appearance on behalf of Representative Daniel D. Rostenkowski, who had been indicted in the Post Office scandal. The Rostenkowski case was assigned to the same district judge as was Petitioner's (Judge Norma H. Johnson), but the cases were not joined. The United States informed the district judge that it believed that Mr. Mundy was conflicted from the Rostenkowski case because of his representation of Petitioner, and on October 16, 1994, the government filed a formal disqualification motion against Mr. Mundy in the Rostenkowski case.

In October 1994, Mr. Weaver retained new counsel, who asked the government to file a substantial assistance motion. The U. S. Attorney did so on November 14, 1994. On December 21, 1994, the district court granted the motion, reducing Petitioner's sentence to time served followed by three years of supervised release.[1]

On February 24, 1997, Petitioner filed a *pro se* motion to vacate sentence pursuant to 28 U.S.C. § 2255

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[1] The disqualification motion was still pending in the district court on April 14, 1995, when Mr. Mundy died. The district court on May 30, 1995 dismissed the motion as moot.

claiming, among other things, that he was denied effective assistance of counsel because Mr. Mundy's representation was tainted by a conflict of interest.[2] The district court held an evidentiary hearing and on June 7, 2000 denied relief in a decision published at 112 F. Supp. 2d 1. (App. A-9)

The district court on July 14, 2000, and the court of appeals on November 6, 2000, granted in relevant part Petitioner's motion for a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(2); and the appeal went forward under 28 U.S.C. § 2253(a). On October 5, 2001, the court affirmed the denial of relief in a decision published at 265 F.3d 1074. (App. A-1) A petition for rehearing or rehearing *en banc,* was denied on November 19, 2001. (App. A-34 to A-35)

STATEMENT OF FACTS

Mr. Mundy's representation of Petitioner commenced after Petitioner had reached a plea agreement and entered his guilty pleas. Yet Mr. Mundy's conflict of interest thwarted Petitioner's opportunity to obtain the benefit of his plea agreement during the time of Mr. Mundy's representation. Petitioner served a sentence that well may have been longer than necessary

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[2] Shortly after Petitioner filed the § 2255 motion, his period of supervised release was terminated.

because of Mr. Mundy's conflict. The issue in the case is whether the timing of Mr. Mundy's representation precludes withdrawal of Petitioner's guilty pleas as a remedy for the constitutional violation that occurred.

Mr. Mundy began representing Mr. Weaver after he entered pleas of guilty pursuant to a plea agreement with the government that required Petitioner to cooperate in the ongoing Post Office investigation. The government expressly promised in return to consider, in its discretion, filing a substantial assistance motion to reduce his sentence, under 18 U.S.C. § 3553(e) and Rule 35(b) of the Federal Rules of Criminal Procedure, "[w]ithin one year of the imposition of sentence."

On July 19, 1993, after Petitioner's initial sentencing, Mr. Mundy wrote the government asking if it would file such a motion. The government responded that it would not do so then but, depending on Petitioner's cooperation with ongoing investigations and prosecutions, possibly would do so later. Except for one later call from his paralegal, Mr. Mundy did nothing whatsoever afterwards to seek a substantial assistance motion for his client.

On May 31, 1994, Representative Rostenkowski was indicted in connection with the Post Office scandal; and on July 5, 1994, Mr. Mundy entered an appearance

on his behalf. The United States then informed the district court and Mr. Mundy that it believed that Mr. Mundy was disqualified from the Rostenkowski case but, in the district court's words, "represented to the Court that the government believed it could resolve this issue directly with Mundy, without the Court's assistance." (App. A-13) In a letter of July 13, 1994, the prosecutors wrote Mr. Mundy that "there is a substantial possibility that Mr. Weaver would be a witness against Congressman Rostenkowski at trial." The letter also stated that Mr. Mundy's dual representation caused "practical difficulties," including the fact that to obtain Mr. Weaver's further cooperation, the government "would have to contact you in order to secure your cooperation to get further information that may be adverse to your new client, Congressman Rostenkowski."

Nothing came of the government's efforts, however; and on October 16, 1994, the government then filed a formal disqualification motion against Mr. Mundy in the Rostenkowski case. The motion noted that on June 10, 1993, before Mr. Weaver's initial sentencing, Mr. Mundy wrote the court's probation office concerning information Mr. Weaver had provided to investigators about Congressman Rostenkowski and

others.[3] The government's disqualification motion then stated that after the Rostenkowski indictment, "the government expected to hear from Mr. Mundy regarding a possible motion to reduce Mr. Weaver's sentence. Mr. Mundy never made such a request."

In October 1994, Petitioner obtained new counsel, Michael Bachner. Just two days after the government filed the Mundy disqualification motion, on October 18, 1994, Mr. Bachner wrote to the prosecutor asking for a substantial assistance motion. On November 14, 1994, the government then filed such a motion on Petitioner's behalf. The district court granted the motion on December 21, 1994, reducing Petitioner's sentence to "time served," followed by 36 months of supervised release.

The United States conceded and the court of appeals held that once Mr. Mundy began his representation of Representative Rostenkowski, Mr. Mundy had an actual conflict of interest. No other conclusion is possible. Petitioner's hopes for a reduced

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[3] In further support of the Mundy disqualification motion, the prosecutors also filed the "Government's *Ex Parte, in Camera* Submission Concerning Information Provided by Gerald Weaver." It provided further details of the assistance Petitioner could provide. It is in the appellate record in redacted form.

sentence rested on his ability to provide substantial assistance against others in the House of Representatives Post Office scandal. From the beginning, the U. S. Attorney knew that Mr. Weaver was prepared to provide material, incriminating evidence against Rostenkowski. But after Mr. Mundy became Rostenkowski's attorney (if not earlier, when Mr. Mundy was seeking Representative Rostenkowski as a client), Mr. Mundy was insolubly conflicted, and his allegiance to Rostenkowski adversely affected his representation of Petitioner. Mr. Mundy could not assist Petitioner in cooperating with the government in the Rostenkowski prosecution, and he could not request a substantial assistance motion on the basis of such cooperation.

The court of appeals opinion said:

> It is agreed that Mundy represented clients with conflicting interests: Weaver's interest lay in assisting the prosecution of Rostenkowski, in the hope that the government would file a substantial assistance motion, while Rostenkowski's interest lay in thwarting his own prosecution and any part Weaver might play in it. That the conflict adversely affected Mundy's representation of Weaver is evident from Mundy's failure to

> request a substantial assistance motion after Rostenkowski was indicted and Mundy undertook to represent him. Under these circumstances Mundy could not serve two masters and, as long as he tried to do so, Weaver was deprived of effective assistance of counsel.

(App. A-6 [notes omitted])

The court found that Mr. Mundy's conflicted representation was ineffective under *Cuyler v. Sullivan*, 446 U.S. 335 (1980). Nonetheless, the court held that Petitioner was not entitled to the remedy he requested. It neither ordered Petitioner's guilty plea vacated, nor remanded the case to the district court (which erroneously found there was no ineffective assistance) to determine the appropriate remedy. The court held:

> The conflict is presumed to have prejudiced the defendant in that Mundy failed while the conflict lasted, from approximately July 5, 1995 to November 29, 1995, to request a substantial assistance motion for Weaver. The remedy for such prejudice, however, is not to set aside the plea, as Weaver asks, but to adjust the

> sentence as if Mundy had made a timely request.

(App. A-7; note omitted)

Petitioner was released from custody shortly after the government's substantial assistance motion was granted on December 21, 1994. By 2000, the only benefit from resentencing would be reduction of a sentence that Petitioner already had served. Instead, Petitioner sought to withdraw his guilty pleas. But because "Weaver insisted at oral argument that he does not wish the court to remand for resentencing but seeks only to have the conviction set aside," the court of appeals affirmed the district court's denial of relief. (App. A-8)

REASONS WHY CERTIORARI SHOULD BE GRANTED

Certiorari should be granted because the decision of the court of appeals conflicts with decisions of the Fifth and Seventh Circuits. Those Circuits do not share the narrow view of the D. C. Circuit on the remedies that are available when a plea bargain has been impaired. In the Fifth and Seventh Circuits, the defendant may choose to withdraw his guilty plea, but the D. C. Circuit held that *only* resentencing was available. The court of appeals in this case acknowledged Mr. Mundy's conflict

and the presumption of prejudice from his conflict. Nonetheless, it held: "The remedy for such prejudice, however, is not to set aside the plea, as Weaver asks, but to adjust the sentence as if Mundy had made a timely request [for a substantial assistance motion]. . . . [B]ecause the conflict did not prejudice Weaver's plea, there is no basis for setting aside the judgment of conviction and the denial of the Section 2255 petition is Affirmed." (App. A-7 to A-8) The D. C. Circuit looked to cases where there was ineffective assistance of counsel at sentencing, and where resentencing was ordered. *United States v. Unger*, 700 F.2d 445, 451-54 (8th Cir.), *cert. denied*, 464 U.S. 934 (1983); *Lopez v. Scully*, 58 F.3d 38, 43 (2nd Cir. 1995); *United States v. Swartz*, 975 F.2d 1042, 1050 (4th Cir. 1992). (App. A-7 to A-8) But none of these cases involved a plea bargain that had been frustrated.

The court of appeals failed to consider the fact that Mr. Mundy's conflict impaired Petitioner's plea bargain and not just his sentence. The conflict hindered Mr. Weaver's ability to provide the cooperation he promised (and hindered the government's ability to obtain information from him), and it prevented Mundy from seeking the benefit that the government promised in return. In its written plea agreement with Petitioner, the government promised to consider filing a substantial assistance motion within a year of Petitioner's initial

sentencing. Mr. Mundy's conflict made that impossible, and the government did not file its motion until nearly 17 months after sentencing. Moreover, the conflict devalued the cooperation Petitioner was able to provide. Mr. Mundy did nothing to facilitate Petitioner's efforts to assist the government with the Rostenkowski prosecution. At least for the period after Mr. Mundy entered his appearance for Representative Rostenkowski, Mr. Mundy *could* do nothing to help Petitioner assist the government.

Assessing the exact amount of prejudice Petitioner suffered is difficult, but it also is unnecessary. In *Holloway v. Arkansas*, 435 U.S. 475 (1978), the Court reaffirmed the principle that "'determin[ing] the precise degree of prejudice'" from defense counsel's conflict of interest "'is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.'" *Id.* at 488 (quoting *Glasser v. United States*, 315 U.S. 60, 75-76 (1942)). Here, the prejudice impaired Petitioner's plea agreement with the government. Mr. Mundy's conflict undermined the basis on which Petitioner gave up his right to stand trial by pleading guilty.

In other Circuits, even after an otherwise valid guilty plea, impairment of the plea bargain may invalidate

the plea. The Fifth Circuit stated in *United States v. Saling*, 205 F.3d 764 (5th Cir. 2000), that:

> [a] defendant who alleges that a plea agreement has been breached *has the option* of seeking one of two remedies on appeal: (1) specific performance, which requires that the sentence be vacated and that the defendant be resentenced by a different judge; or (2) *withdrawal of the guilty plea, and the opportunity to plead anew*, which requires vacation of both the conviction and the sentence.

Id. at 768 (emphasis added; quoting *United States v. Palomo*, 998 F.2d 253, 256 (5th Cir. 1993)). *See Santobello v. New York*, 404 U.S. 257, 268 n.* (1971) (Marshall, J., concurring and dissenting) (in case of broken plea bargain, "a majority of the Court appears to believe that . . . when the defendant seeks to vacate the plea, that relief should generally be granted."); *see also United States v. Valencia*, 985 F.2d 758 (5th Cir. 1993); *United States v. Ewing*, 480 F.2d 1141 (5th Cir. 1973) (violation of plea agreement invalidates guilty plea).

The Fifth Circuit took this rule from the Seventh Circuit's decision in *United States v. Burrell*, 963 F.2d 976 (7th Cir.), *cert. denied*, 506 U.S. 928 (1992). There the court

stated, "[A] guilty plea induced by an unkept promise is involuntary." Consequently, if the prosecutor breaks a promise that is material to a plea agreement, "the court *must* allow the defendant to withdraw the plea and start over." *Id.* at 985 (emphasis added; quoting *United States v. Smith*, 953 F.2d 1060, 1066 (7th Cir. 1992)).

In the present case, to be sure, the initial and fundamental cause of the impairment of Petitioner's plea agreement was the conflict of interest of his sentencing counsel, Mr. Mundy. But if a prosecutor's vitiation of an agreement renders the antecedent guilty plea involuntary, as *Burrell* states, then counsel's wrongdoing must have the same effect. There is no difference to the defendant; either way, the plea agreement is vitiated or impaired. Moreover, the prosecutors here must share the blame. They were aware of the conflict yet failed to inform Petitioner. Instead, they advised the district court but initially urged the court to take no action. Months later, they filed a disqualification motion against Mr. Mundy in the Rostenkowski case. This motion at last put Mr. Mundy's conflict on the public record, but by then, Petitioner already had served months longer in prison than he likely would have if his attorney had made a timely request for a substantial assistance motion. Mr. Weaver immediately hired new counsel, who requested a substantial assistance motion, but Petitioner irretrievably lost the benefit of a more timely sentence reduction.

The usefulness and quality of Petitioner's cooperation also was immeasurably impaired. Thus, the prosecutors' conduct contributed to the impairment of Petitioner's plea bargain.[4]

The trial court also is at fault for failing to do anything to protect Petitioner's rights, despite its knowledge of Mr. Mundy's conflict. The provisions of Fed.R.Crim.P. 44(c) do not literally apply in this circumstance, because the Rostenkowski indictment was never joined to Petitioner's case, but the court nonetheless had a duty at least to inquire once it learned

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[4] The courts of appeals have applied contract law ideas of "good faith" and "fair dealing" to hold that when the government promises in a plea agreement to exercise its discretion in deciding whether to file a substantial assistance motion, the failure to file such a motion may be reviewable for bad faith. *United States v. Isaac*, 141 F.3d 477, 481-83 (3rd Cir. 1998) (citing cases). The Third Circuit distinguished *Wade v. United States*, 504 U.S. 181 (1992), where the Court allowed only narrower review of the prosecutor's decision, in the absence of a plea agreement.

Here, the government's failure to inform Petitioner of his counsel's conflict, its failure ever to move for Mr. Mundy's disqualification in Petitioner's case, and its failure to move in a more timely way for Mr. Mundy's disqualification in the Rostenkowski case impeded Petitioner's ability to cooperate with the government and receive the benefits for which he bargained.

that the government believed that Mr. Mundy had an intractable conflict of interest. *Cf. Wheat v. United States*, 486 U.S. 153 (1988); *McMann v. Richardson*, 397 U.S. 759, 771 (1970) ("Defendants cannot be left to the mercies of incompetent counsel, and the judge should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts.").

But the broader point is that the approach of the D. C. Circuit conflicts with that of the Fifth and Seventh Circuits. The D. C. Circuit has held that a defendant never may withdraw a guilty plea, even when counsel's conflict of interest has vitiated or impaired the plea agreement under which the defendant pled guilty. The Fifth and Seventh Circuits, in contrast, have held that vitiation of a plea agreement makes the plea itself involuntary, and entitles the defendant, at his option, to withdraw the plea. These positions are fundamentally at odds, and this Court's review is necessary to resolve the conflict.

CONCLUSION

Certiorari should be granted to review the decision of the District of Columbia Circuit. This Court's guidance is needed on the question of whether withdrawal of a guilty plea is an available remedy when defense counsel's conflict of interest denied the

defendant's Sixth Amendment right to counsel and impaired or vitiated the defendant's plea agreement with the government.

Respectfully submitted,

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Dated: February 15, 2002

APPENDIX

UNITED STATES OF AMERICA, APPELLEE v. GERALD W. WEAVER II, APPELLANT

No. 00-3064

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

265 F.3d 1074

September 6, 2001, Argued
October 5, 2001, Decided

COUNSEL: Gerald W. Weaver II argued the cause pro se.

Christopher S. Rhee, Assistant United States Attorney, argued the cause for the appellee. Kenneth L. Wainstein, United States Attorney, and John R. Fisher and Thomas J. Tourish, Jr., Assistant United States Attorneys, were on brief.

JUDGES: Before: HENDERSON, RANDOLPH and ROGERS, Circuit Judges. Opinion for the court filed by Circuit Judge HENDERSON.

OPINION BY: KAREN LECRAFT HENDERSON

KAREN LECRAFT HENDERSON, Circuit Judge: Gerald W. Weaver filed a petition pursuant to 28 U.S.C. § 2255 seeking to have his guilty plea set aside on the ground that his former lawyer, R. Kenneth Mundy, had had a conflict of interest. The district court concluded that, while Mundy's simultaneous representation of Weaver and of then U.S. Rep. Daniel D. Rostenkowski, against whom Weaver was a potential witness,

created a conflict, Weaver had not shown the necessary prejudice to establish an ineffective assistance of counsel claim. See United States v. Weaver, 112 F. Supp. 2d 1 (D.D.C. 2000). We conclude that Weaver established both the existence of a conflict and prejudice flowing therefrom. We nonetheless affirm the district court's denial of Weaver's petition because the prejudice was limited to the period during which the conflict existed and therefore did not affect Weaver's guilty plea which was entered more than a year before the conflict arose.

I.

Weaver was an aide to U.S. Rep. Joseph P. Kolter from 1983-87. In 1992 Weaver was indicted on 22 counts, all but one arising from his involvement in the House of Representatives Post Office scandal. On March 31, 1993 Weaver pleaded guilty, pursuant to a negotiated plea agreement, to one count each of obstruction of justice, conspiracy to distribute cocaine and distribution of cocaine. The agreement provided that Weaver would cooperate in the ongoing Post Office investigation and that if the United States Attorney determines [Weaver] has provided substantial assistance in the investigation or prosecution of other persons, the United States Attorney may, in his discretion, file motions under title 18, United States Code, Section 3553(e), and Rule 35(b), Federal Rules of Criminal Procedure advising the District Court of the assistance to law enforcement authorities.

112 F. Supp. 2d at 2.[1] Around the same time, Weaver provided

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[1]Section 3553(e) provides:

(e) Limited authority to impose a sentence below a statutory minimum.--Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

18 U.S.C. § 3553(e). Rule 35(b) provides:

(b) Reduction of Sentence for Substantial Assistance. If the Government so moves within one year after the sentence is imposed, the court may reduce a sentence to reflect a defendant's subsequent substantial assistance in investigating or prosecuting another person, in accordance with the guidelines and policy statements issued by the Sentencing Commission under 28 U.S.C. § 994. The court may consider a government motion to reduce a sentence made one year or more after the sentence is imposed if the defendant's substantial assistance involves information or evidence not known by the defendant until one year or more after sentence is imposed. In evaluating whether substantial assistance has been rendered, the court may consider the defendant's pre-sentence assistance. In applying this subdivision, the court may reduce the sentence to a level below that established by statute as a minimum sentence.

Fed. R. Crim. P. 35(b).

information to the government implicating Kolter, Rostenkowski and Robert V. Rota, the House Postmaster.

After Rota pleaded guilty on July 19, 1993, Mundy wrote the government asking if it had made a decision whether to file a substantial assistance motion on Weaver's behalf and requesting that, if not, the government consent to postpone Weaver's surrender date. In a letter dated August 5, 1993 the government responded that Weaver's information did not assist in obtaining Rota's plea and that he had not otherwise substantially assisted in a prosecution but that the government would further evaluate the matter down the road.

Rostenkowski was indicted on May 31, 1994 and on July 5, 1994 Mundy entered an appearance on his behalf. The government contacted both Mundy and the district court urging Mundy's disqualification from the Rostenkowski case because his dual representation of Rostenkowski and of Weaver, a potential witness against Rostenkowski, created a conflict of interest. When Mundy refused to withdraw, the government filed a formal motion on October 16, 1994 to disqualify him.

While the motion was pending, Weaver obtained new counsel who entered an appearance on November 29, 1994 and requested that the government file a substantial assistance motion. The government did so and on December 21, 1994 the district court reduced Weaver's sentence to time served but rejected Weaver's request to eliminate supervised release. Mundy died on April 14, 1995 and in an order filed May 30, 1995 the district court dismissed as moot the government's motion to disqualify him.

On February 24, 1997 Weaver filed a section 2255 petition to set aside his conviction based, inter alia, on Mundy's conflict of interest. On August 11, 1997, with the government's consent, the

district court stayed the remaining four months of Weaver's supervised release. The district court denied Weaver's petition in a memorandum opinion filed June 7, 2000.

II.

Weaver contends his guilty plea should be set aside because it was "tainted" by the conflict of interest created by Mundy's simultaneous representation of both Weaver and Rostenkowski.[2] We agree with Weaver, as does the government, that a conflict adversely affected Mundy's representation. We nevertheless conclude, as the government maintains, that the conflict does not justify vacating his conviction.

In Cuyler v. Sullivan, 446 U.S. 335, 64 L. Ed. 2d 333, 100 S. Ct. 1708 (1980), the United States Supreme Court established that to make out a conflict of interest claim a petitioner "must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." 446 U.S. at 349. "A defendant who proves an actual conflict of interest thus avoids the more stringent requirement of proving that the lawyer's 'deficient performance prejudiced the defense,' Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984), for such prejudice is presumed, United States v. Farley, 315 U.S. App. D.C. 240, 72 F.3d 158, 166 (D.C. Cir. 1995)." United States

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[2]Weaver also seeks to void his plea on the ground that the initial district judge, who recused herself, without explanation, on April 23, 1997, was in fact disqualified much earlier in the case. He has offered no substantiation for his claim and has therefore failed to "make a substantial showing of the denial of a constitutional right" as required under 28 U.S.C. § 2253(c)(2). Accordingly, we deny his motion for a certificate of appealability of this issue.

v. Thomas, 324 U.S. App. D.C. 374, 114 F.3d 228, 252 (D.C. Cir.), cert. denied, 522 U.S. 1033, 139 L. Ed. 2d 614, 118 S. Ct. 635 (1997). The defendant need only show "that a conflict of interest actually affected the adequacy of his representation." Cuyler, 446 U.S. at 350. Weaver made such a showing below.

It is agreed that Mundy represented clients with conflicting interests[3]: Weaver's interest lay in assisting the prosecution of Rostenkowski, in the hope that the government would file a substantial assistance motion, while Rostenkowski's interest lay in thwarting his own prosecution and any part Weaver might play in it. That the conflict adversely affected Mundy's representation of Weaver is evident from Mundy's failure to request a substantial assistance motion after Rostenkowski was indicted and Mundy undertook to represent him. Under these circumstances Mundy could not serve two masters and, as long as he tried to do so, Weaver was deprived of effective counsel.[4] This deprivation does not, however, justify setting aside his plea or conviction.

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[3]The district court noted in its order that "there is some evidence in the record to suggest that Mundy may have effectively terminated his relationship with Weaver prior to the entry of his appearance in the Rostenkowski action." 112 F. Supp. 2d at 5 n.12. The district court then stated: "It is worth noting that there may indeed be no conflict of interest in Weaver's case since Mundy may have terminated his relationship with Weaver before he entered his appearance for Rostenkowski." Id. On appeal, the government has conceded that there was a conflict.

[4]The government suggests that Weaver possessed no Sixth Amendment right to effective counsel post-sentencing. Because the government failed to so argue below, we need not decide the issue here.

To have a plea set aside on a section 2255 petition, the petitioner "must show that the plea proceeding was tainted by 'a fundamental defect which inherently results in a complete miscarriage of justice' or 'an omission inconsistent with the rudimentary demands of fair procedure.'" Farley, 72 F.3d at 162 (quoting Hill v. United States, 368 U.S. 424, 428, 7 L. Ed. 2d 417, 82 S. Ct. 468 (1962)). Weaver has not demonstrated that Mundy's post-sentencing conflict in any way tainted his guilty plea. Mundy undertook to represent Weaver only after Weaver had already pleaded guilty and, to all appearances, he represented Weaver ably at sentencing.[5] It was not until a year after the sentencing (and some 14 months after the guilty plea) that Mundy undertook to represent Rostenkowski, giving rise to the conflict of interest. The conflict is presumed to have prejudiced the defendant in that Mundy failed while the conflict lasted, from approximately July 5, 1995 to November 29, 1995, to request a substantial assistance motion for Weaver.[6] The remedy for such prejudice, however, is not to set aside the plea, as Weaver asks, but to adjust the sentence as if Mundy had made a timely request. See United States v. Unger, 700 F.2d 445, 451-54 (8th Cir.) (remanding for resentencing on account of conflict that adversely affected representation during sentencing but holding "plea should stand" because "there was no conflict of interest that

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[5]Mundy persuaded the district court to reduce Weaver's base offense level by two points for acceptance of responsibility under U.S.S.G. § 3E1.1, notwithstanding Weaver's plea to obstruction of justice and contrary to the presentencing report's recommendation.

[6]In finding that Weaver was not "adversely affected" by the conflict, the district court incorrectly applied the Strickland requirement that prejudice be established rather than the Cuyler presumption of prejudice.

adversely affected [the defendant's] representation when she pleaded guilty"), cert. denied, 464 U.S. 934, 78 L. Ed. 2d 308, 104 S. Ct. 339 (1983); see also Lopez v. Scully, 58 F.3d 38, 43 (2d Cir. 1995) (sending case back to state court "solely for resentencing" because of actual conflict of interest during sentencing); United States v. Swartz, 975 F.2d 1042, 1050 (4th Cir. 1992) (sentence vacated and case "remanded for resentencing" on account of conflict during sentencing). But Weaver insisted at oral argument that he does not wish the court to remand for resentencing but seeks only to have the conviction set aside. Accordingly, because the conflict did not prejudice Weaver's plea, there is no basis for setting aside the judgment of conviction and the denial of the section 2255 petition is

Affirmed.

UNITED STATES OF AMERICA, Plaintiff, v. GERALD W. WEAVER II, Defendant.

Crim. No. 92-453 (TFH)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

112 F. Supp. 2d 1

June 7, 2000, Decided
June 7, 2000, Filed

COUNSEL: For Defendant(s): John Anthony Briley, Esq., Washington, D.C.

For Defendant(s): Russell Frank Canan, Esq., Kiersch & Lobo, Washington, D.C.

JUDGES: Thomas F. Hogan, United States District Judge.

OPINION BY: Thomas F. Hogan

MEMORANDUM OPINION

Pending before the Court is defendant's Motion to Set Aside, Vacate, and Reverse Judgment of Conviction, pursuant to 28 U.S.C. § 2255. Upon careful consideration of the briefs, the testimony presented at the four hearings held in this case, and the entire record herein, the Court will deny defendant's Motion in its entirety.

I. BACKGROUND

By a fourteen count indictment filed November 22, 1992, the Grand Jury charged defendant Gerald Weaver II ("Weaver") with Obstruction of Justice, in violation of 18 U.S.C. § 1503; Tampering with a Witness, in violation of 18 U.S.C. § 1512(b)(3); Conspiracy to Possess Cocaine, in violation of 21 U.S.C. § 846; nine counts of Possession of Cocaine, in violation of 21 U.S.C. § 844; Distribution of Cocaine, in violation of 21 U.S.C. § 841; and Conspiracy to Commit Wire Fraud, in violation of 18 U.S.C. § 371.

On February 16, 1993, the Grand Jury returned a twenty-one count superseding indictment charging the original counts, as well as nine additional counts of Distribution of Cocaine, in violation of 21 U.S.C. § 841.[7]

On March 31, 1993, Weaver entered guilty pleas before Judge Norma Holloway Johnson to three counts of the indictment: conspiracy to distribute a controlled substance, distribution of a controlled substance, and obstruction of justice.[8] His plea agreement provided:

> Within one year of the imposition of sentence, the United States Attorney may review the timeliness, nature, extent, completeness, accuracy, truthfulness, assistance, and testimony of Gerald W. Weaver II. If the United States Attorney determines Gerald W. Weaver II has

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[7]During this time, prior to his appointment to the Superior Court of the District of Columbia, Weaver was represented by Judge Russell F. Canan ("Canan").

[8]Weaver was represented at this time by Jeffrey O'Toole ("O'Toole"), who entered his appearance on March 11, 1993.

> provided substantial assistance in the investigation or prosecution of other persons, the United States Attorney may, in his discretion, file motions under Title 18, United States Code, Section 3553(e), and Rule 35(b), Federal Rules of Criminal Procedure advising the District Court of the assistance to law enforcement authorities. Gerald W. Weaver II has no right to compel or require that the United States Attorney will file such a motion.

Plea Agreement at P 14.

Consistent with the plea agreement, Weaver was interviewed in the United States Attorneys' Office on March 29, 1993, and April 29, 1993.[9] Three months later, on June 30, 1993, after a sentencing hearing in which the Court awarded a two-level reduction in the offense level for acceptance of responsibility, defendant was sentenced to a period of twenty-four months

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[9]As a former Administrative Assistance to Congressman Joseph Kolter ("Kolter"), Weaver provided information about criminal conduct related to the House of Representatives Post Office. The government later represented in an Ex Parte, In Camera Submission in Support of its Motion to Reduce the Sentence of Gerald W. Weaver II, filed on November 14, 1994, that defendant's information was important to the indictment of Congressman Joseph P. Kolter on October 18, 1994 (U.S. v. Joseph Kolter, 94-404 (NHJ)). Mr. Weaver also provided information that may be used in the trial of Congressman Daniel Rostenkowski, who was indicted on May 31, 1994 (U.S. v. Daniel Rostenkowski, 94-226 (NHJ)).

confinement on each count, to be served concurrently, followed by concurrent terms of thirty-six months supervised release.[10]

On July 28, 1993, Mundy wrote to the United States Attorney asking whether a decision on submitting a Motion for Reduction of Sentence had been made, and in the event that a decision had not been reached, requesting a delay in Weaver's surrender date.[11] On August 5, 1993, Assistant United States Attorney Thomas Motley ("Motley") denied Mundy's requests and advised that, as of this time, the information has not provided substantial assistance in the prosecution of another person who has committed an offense."[12]

On August 16, 1993, Weaver surrendered to the Bureau of Prisons.

On May 31, 1994, Congressman Daniel Rostenkowski ("Rostenkowski") was indicted. On July 6, 1994, Mundy entered an appearance on behalf of Rostenkowski. The Government

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[10]Weaver was represented at this time by new counsel, R. Kenneth Mundy ("Mundy"), who had entered his appearance on June 11, 1993.

[11]Mundy noted that "House Postmaster Robert Rota had recently pled guilty and may be offering evidence against Congressman Kolter, corroborative and confirmatory of the considerable information provided by my client." See Gov't Opp., Exhibit 1, attachment 6.

[12]Specifically, Motley indicated that, "the information which Mr. Weaver has provided did not assist us in obtaining the guilty plea of former House Postmaster Robert Rota." See Gov't Opp., Exhibit 1, attachment 7.

immediately brought this potential conflict of interest to the attention of the Court, but represented to the Court that the government believed it could resolve this issue directly with Mundy, without the Court's assistance. On October 16, 1994, the government, unable to resolve the issue with Mundy directly, filed in the Rostenkowski action a Motion to Disqualify Defense Counsel Based Upon Conflicts of Interest. See Gov't Opp., Exhibit 1. Mundy passed away before the Court had a chance to rule upon the government's Motion, and the Motion was subsequently dismissed as moot.

On October 18, 1994, Congressman Kolter was indicted. On November 14, 1994, the government filed a Motion to Reduce Sentence, pursuant to Fed. R. Crim. P. 35, which included information for in camera review.[13] In a written order filed on December 21, 1994, Judge Johnson granted the government's Motion and reduced defendant's sentence to "time served," followed by the original period of supervised release, thirty-six months.[14]

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[13]Weaver had retained new counsel in October of 1994. On October 19, 1994, Michael Bachner ("Bachner") wrote to the United States Attorney's Office asking that a request for a reduction of Weaver's sentence be taken to the Departure Committee. See Gov't Opp., Exhibit 2.

[14]With the original sentence, Weaver's incarceration would have run from August 16, 1993 through August 16, 1995. As a result of the government's motion and Judge Johnson's ruling, Weaver's incarceration ran from August 16, 1993 to December 21, 1994, a total of 16 months and 5 days. His counsel acknowledged in the defendant's Response to the Government's Rule 35 Motion that Weaver had been transferred to a halfway

(continued...)

On February 24, 1997, Weaver filed the instant Motion to Set Aside, Vacate, and Reverse Conviction, pursuant to 28 U.S.C. § 2255. On August 11, 1997, after Judge Johnson recused herself and Weaver's case was reassigned,[15] Judge Urbina stayed the supervised release portion of the defendant's sentence. On September 11, 1997, the United States moved for a formal Court Ruling on the Waiver of the Attorney-Client Privilege with regard to Canan and O'Toole. On September 18, 1997, the government filed an Opposition to Defendant's Motion to Set Aside, Vacate, and Reverse Judgment of Conviction, addressing the Mundy representation.

On September 24, 1997 and again on September 30, 1997, Weaver filed motions for additional time to file supplemental pleadings. These motions were unopposed and were granted by Judge Urbina on October 3, 1997. On October 27, 1997, Weaver filed his reply to the government's opposition to his Motion to Set Aside, Vacate, and Reverse Judgment of Conviction. Also on that date, Weaver petitioned to proceed pro se in filing another reply to the government's opposition. On November 4, 1997, Weaver moved to dismiss his court-appointed attorney and to proceed pro se. On January 20, 1998, Judge Urbina granted the motion of John Anthony Briley, Jr., Weaver's court-appointed attorney, to withdraw as counsel.

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[14](...continued)
house on November 14, 1994. Accordingly, Weaver's "actual incarceration in prison" constituted one year and three months. See 12/12/94 letter of Michael Bachner to Judge Johnson at 4.

[15]Weaver's case was randomly reassigned from Judge Johnson to Judge Urbina by direction of the Calendar Committee on April 23, 1997.

Between March 9 and March 12, 1998, Weaver filed three supplements to his § 2255 Motion. On May 28, 1998, Weaver filed a motion for default judgment and order reversing his conviction for failure of the Court to hold a "prompt hearing." On June 8, 1998, Weaver filed for sanctions against the opposing attorney. On June 16, 1998, Judge Urbina granted the government's motion to waive Weaver's attorney-client privilege. On June 18, 1998, the Court received the government's response to the claims regarding O'Toole and Canan in defendant's § 2255 motion.

On June 22, 1998, Weaver moved for Reconsideration of the Ruling on the Waiver of the Attorney-Client Privilege and also for Default Judgment. On August 17, 1998, Weaver filed a Notice of Appeal from Judge Urbina's August 6, 1998 order denying Weaver's motion for reconsideration of the Court's ruling on the government's motion to waive Weaver's attorney-client privilege. Subsequently, Weaver petitioned for Writ of Mandamus in the United States Court of Appeals for the District of Columbia. On September 11, 1998, the Court of Appeals vacated Judge Urbina's Order on the Attorney-Client privilege issues; the Court of Appeals also denied Weaver's petition for mandamus.

On October 9, 1998, this case was reassigned from Judge Urbina to Judge Hogan at the direction of the Calendar Committee. On October 28, 1998, the Court of Appeals dismissed as moot defendant's appeal of Judge Urbina's order denying his motion for default judgment. On November 2, 1998, the Court convened a status conference to review the pending motions. On January 4, 1999, the Court held that Weaver had waived his attorney-client privileges as to attorneys

Canan and O'Toole. On March 5, 1999, the government filed its supplemental opposition to defendant's § 2255 Motion.

Weaver then filed a Superseding Motion for Default Judgment and/or Summary Judgment on February 19, 1999; a Motion to Alter or Amend Judgment on March 5, 1999; a reply memorandum in support of his § 2255 Motion on March 17, 1999; a Final Superseding Motion for Default Judgment and/or Summary Judgment on November 16, 1999; a Statement of Undisputed Facts and Conclusions of Law Preparatory to the December 6, 1999 hearing on November 16, 1999; a Closing Argument and Post-Hearing Brief on April 5, 2000; and a Reply to the Government's Closing Argument on May 29, 2000.

On December 6, 1999, this Court began the first of four evidentiary hearings on defendant's § 2255 Motion. Subsequent hearings were held on December 13, 1999; March 10, 2000[16]; and April 5, 2000. Some witnesses were provided voluntarily by the government, and those unwilling to appear were subpoenaed by the Court, at Weaver's request.

II. DISCUSSION

A defendant claiming a conflict of interest is required to show that his attorney made a choice advancing his own interests to the detriment of his client's interests.

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[16]This March 10 hearing date was originally scheduled for January 6 but was continued at defendant's request since he had not followed the proper Court procedures for having his witnesses subpoenaed. The Court offered defendant hearing dates in February, but Weaver insisted that he needed the testimony of Motley who was out of the office from January 20, 2000 through the month of February. March 10 was selected since it was the first available Court date after Motley returned.

United States v. Bruce, 319 U.S. App. D.C. 245, 89 F.3d 886, 893 (D.C. Cir. 1996). The conflict of interest in this case allegedly arose when Mundy, defendant's sentencing attorney, entered his appearance at the arraignment of Congressman Rostenkowksi in July of 1994.[17] However, to obtain relief pursuant to a conflict of interest claim, a defendant must show that "a conflict of interest adversely affected the adequacy of [his attorney's] representation." Cuyler v. Sullivan, 446 U.S. 335, 349-50, 64 L. Ed. 2d 333, 100 S. Ct. 1708 (1980); see also United States v. Harris, 846 F. Supp. 121, 128 (D.D.C. 1994) ("an actual conflict of interest is not enough for a presumption of prejudice. The second prong of this standard requires that the conflict have an adverse effect upon the attorney's performance") (emphasis added). To demonstrate "adverse effect," a defendant must establish that "an actual lapse in representation" resulted from the conflict. Winkler v. Keane, 7 F.3d 304, 309 (2d Cir. 1993), quoting Cuyler, 446 U.S. at 336.

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[17]The conflict of interest of Mundy in July of 1994 with regard to the Rostenkowski action is undisputed by the government. This is true because, whether Weaver was a former or current client of Mundy, the District of Columbia Rules ("D.C. Rules") of Professional Conduct clearly dictate that Mundy should not have entered his appearance in a case involving a person against whom his client or former client was cooperating. See D.C. Rules 1.7 and 1.9. However, this case is concerned exclusively with the effect of that conflict of interest on Mr. Weaver's case. The government argues that Mundy's conflict did not adversely affect his representation of Weaver and that therefore there was only limited, if any, prejudice. Weaver argues that Mundy's conflict of interest tainted Weaver's entire case and justifies the withdrawal of his pleas and the reversal of his convictions.

Defendant argues that his sentencing attorney's failure to contact the government after the Rostenkowski indictment on May 31, 1994, and his attorney's failure to renew the defense request for the government to submit a Rule 35(b) motion arguing for a reduction in his client's sentence, establishes a meritorious conflict of interest claim. See Def. Closing at 10. Assuming that Mundy had not previously terminated his representation of Weaver[18], the Court acknowledges that an actual conflict of interest would have existed from the time Mundy entered his appearance for Rostenkowski in July of 1994 until the time Weaver retained new counsel in this case in

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[18]The Court notes that there is some evidence in the record to suggest that Mundy may have effectively terminated his relationship with Weaver prior to the entry of his appearance in the Rostenkowski action. See Opp. to Motion to Disqualify Defense Attorney at 5-7 (citing a March 31, 1994 letter from Mundy to Weaver, in which Mundy advises Weaver that Motley rejected Mundy's request for a reduction of sentence and that there was nothing further that could be done for Weaver.); see also Id. at 6 (citing Mundy's affidavit, in which Mundy explained that, after receiving a May 24, 1994 letter from Weaver urging Mundy to do more on the cooperation issue, Mundy "called for him at McKean Satellite Camp to explain that there was nothing more I could do and to tell him I considered the matter of representation completed."). However, since Mundy is not available to testify and since his affidavit explains that, although Mundy "left word for Mr. Weaver to call," his call was never returned, Mundy aff., no. 10, for purposes of this Motion, the Court will assume that Mundy was still representing Weaver during the period in question. Nevertheless, it is worth noting that there may indeed be no conflict of interest in Weaver's case since Mundy may have terminated his relationship with Weaver before he entered his appearance for Rostenkowski.

October of 1994. However, the Court strongly disagrees with defendant's contention that this conflict of interest, assuming it did indeed exist, requires an automatic reversal of his convictions by way of his guilty pleas. The Court finds that even if there was a conflict of interest in this case, that conflict did not result in any "adverse impact" on Weaver's case. Therefore, there is insufficient evidence of manifest injustice or adverse effect to allow this defendant to withdraw his guilty pleas and to vacate his convictions.

A. Weaver Has Not Met the Standards of Manifest Injustice Governing Plea Withdrawals

To mount a successful post-sentence attack on a guilty plea, a defendant must establish that permitting the plea to stand would result in "manifest injustice." United States v. McKoy, 207 U.S. App. D.C. 112, 645 F.2d 1037, 1040 n.3 (D.C. Cir. 1981). Moreover, to prevail on a motion to vacate, set aside, or reverse conviction pursuant to 28 U.S.C. § 2255, a defendant must show "a fundamental defect, which inherently results in a complete miscarriage of justice" or "an omission inconsistent with the rudimentary demands of fair procedure." Hill v. United States, 368 U.S. 424, 428, 7 L. Ed. 2d 417, 82 S. Ct. 468 (1962); see also United States v. Farley, 315 U.S. App. D.C. 240, 72 F.3d 158, 162 (D.C. Cir. 1995); United States v. Pollard, 959 F.2d 1101, 1020 (D.C. Cir.), cert. denied, 506 U.S. 915, 121 L. Ed. 2d 242, 113 S. Ct. 322 (1992). Weaver has not satisfied these standards.

1. No Error In Rule 11 Colloquy

Weaver has not alleged any defect in the Rule 11 colloquy. The regularity of the Rule 11 proceedings is the "most important factor" for the Court to consider in reviewing a motion to vacate a conviction. United States v. Cray, 310 U.S. App. D.C. 329, 47 F.3d 1203, 1207 (D.C. Cir. 1995) (defendant must show either

error in taking the plea or some "more substantial" reason he failed to press his case rather than plead guilty). Weaver does not allege, nor does the record reflect, any error in the Rule 11 colloquy in this case.

2. No Merit to Ineffective Assistance Claims Against Plea Attorneys

Weaver raises several ineffective assistance claims against his plea attorneys. However, these arguments contradict the testimony at the evidentiary hearings. At the December 13, 1999 hearing, Canan detailed his thorough investigation and preparation of defendant's case. See Tr. 12/13/99 at 30-33, 39. He further explained that, once he was nominated to the Superior Court of the District of Columbia, he withdrew from nearly all of his active trial cases, and then tried to match his clients with specific attorneys who could handle their matters." Id. at 16-17, 46-47. In Weaver's case, Canan testified that he recommended O'Toole, because he personally knew O'Toole as a competent and well-respected criminal defense attorney who could effectively handle Weaver's federal case. Id. at 23, 47, 51. In addition to testifying that O'Toole was "the person I would go to if I ever got into a jam," Tr. 12/13/99 at 47, Canan also explained that O'Toole had a break in his schedule and was free to devote the entire upcoming month to the final investigation and trial preparations of defendant's case. Tr. 12/13/99 at 48; see also Tr. 12/6/99 at 31-32, 42-43, 50-51. Therefore, with Weaver's consent, Canan, O'Toole, and Weaver met and discussed the case extensively. Tr. 12/6/99 at 29-30, 51-52. At the end of the day, Weaver decided to accept the representation of O'Toole. Id. At that time, Weaver also accepted the proposal by Canan to pay O'Toole half of the retained fee he had received from the defendant. Tr. 12/6/99 at 34-39, 52; Tr. 12/13/99 at 51-52.

O'Toole testified that Weaver authorized him to begin plea negotiations after O'Toole conveyed his impressions of the case.[19] Subsequently, O'Toole had numerous conversations and meetings with Motley, and the parties successfully negotiated a plea agreement that: (1) limited the defendant's guideline exposure by stipulating to a specific amount of drugs involved in the conspiracy; (2) obligating the defendant to plead guilty to Obstruction of Justice; and (3) offering the defendant the potential to reduce his sentence through cooperation and the possibility of a Rule 35(b) motion. Tr. 12/6/99 at 62-63.

Defendant argues that O'Toole was ineffective when he failed to move for a continuance, after he took over defendant's case, despite Weaver's feelings on the subject. See Def. Closing at 46. Defendant claims that O'Toole chose not to move for this continuance because it would have been denied by Judge Johnson, and because it would have required O'Toole's "friend and colleague Russ Canan" to stay on the case. Def. Closing at 48. Weaver alleges a conflict of interest between Canan and O'Toole, claiming "at this point, it was in the interest of Mr. O'Toole and in the interest of his friend, payor, former law partner, and future judge Russell Canan to see Mr. Weaver swept into federal prison as swiftly as possible." Id. at 53. The Court finds no evidence in the record to support these assertions. O'Toole testified that he received a well-prepared and investigated case, and after re-investigating the charges and speaking with almost all the lawyers representing the witnesses that were going to testify, he did not feel that he had a good faith

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[19]Specifically, O'Toole testified that, after re-investigating and preparing the case for trial, it became evident to him that Weaver was going to be found guilty and that he would be incarcerated for much longer than he wanted to be. Tr. 12/6/99 at 55-58.

basis to request a continuance, nor did he feel that he needed one. Tr. 12/6/99 at 78-80, 83-85.

Based upon the testimony at the four evidentiary hearings as well as all evidence in the record, this Court cannot find any support for Weaver's assertion that "but for [his] counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 57, 88 L. Ed. 2d 203, 106 S. Ct. 366 (1985). In fact, the transcript of Weaver's plea shows that Weaver was explicitly asked whether or not he was satisfied with his counsels' representation and he answered affirmatively. See 3/31/93 Tr. at 7. Therefore, this Court finds no merit to Weaver's claims of ineffective assistance of counsel against attorneys Canan or O'Toole.

3. Defendant Has Made No Attempt to Refute his Guilt

A defendant's failure to assert his innocence, although not in itself dispositive, "certainly mitigates against withdrawal." United States v. Horne, 300 U.S. App. D.C. 169, 987 F.2d 833, 837 (D.C. Cir. 1993). Moreover, for a plea withdrawal motion to be successful, a defendant must set forth a "legally cognizable defense" to the charge against him. United States v. Cray, 310 U.S. App. D.C. 329, 47 F.3d 1203, 1207 (D.C. Cir. 1995). This is something more than "a general denial in order to put the government to its proof; he must affirmatively advance an objectively reasonable argument that he is innocent, see Barker v. United States, 168 U.S. App. D.C. 312, 514 F.2d 208, 226 n.17 (D.C. Cir. 1964), for he has waived his right to simply try his luck before a jury." Cray, 47 F.3d at 1209.

At the hearing on defendant's motion, testimony was elicited that defendant admitted his guilt to the charged offenses not only during the plea colloquy and to the presentence report writer, but

also to his plea attorneys,[20] see Tr. 12/13/99 at 26, 28, 44-46; Tr. 12/6/99, at 60-62, 64, 90, 95-96, as well as to Assistant United States Attorney Thomas Motley. Tr. 3/10/00 at 78. Judge John Campbell ("Campbell"), Chief of the Public Corruption and Government Fraud Section in the United States Attorneys Office at the time of Weaver's case, also testified that he had no doubt that Weaver would have been convicted of Obstruction of Justice had he proceeded to trial, since the government had him "dead to rights, as it were, we had him on tape." Tr. 3/10/00 at 30.

While the right to effective assistance of counsel is not "conditioned upon actual innocence," the standards for a Court to review when a defendant requests a Court to withdraw his guilty plea do include a review of the defendant's failure to assert his innocence.

4. The Prejudice to the United States Would be Substantial

In evaluating a motion to withdraw a guilty plea, the Court must also consider the prejudice to the government should defendant's motion be granted and the case returned to the trial calendar. It is clear that reconstructing this case now, seven years after Weaver's guilty pleas and more than ten years after the commission of the offenses, would be difficult if not impossible.[21] See Tr. 3/10/00 at 32-33 (Campbell testified that

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[20]There were further admissions of guilt both by the defendant himself and his witnesses at the June 30, 1993 sentencing before Judge Johnson. See Tr. 6/30/93.

[21]Weaver argues that this delay is solely attributable to the government's refusal to concede defendant's alleged prejudice,

(continued...)

reconstructing this case would be "difficult" because "one of the witnesses had died," he had no idea "what procedures were in place [in 1993] for preserving the evidence," and only one of the prosecutors who had worked on this case was still in the United States Attorneys office); Tr. 3/10/00 at 75, 77 (Motley testified that he did not know whether this case could be reconstructed for trial in 2000, because there were between 15 and 20 major witnesses who would have to be called back and even in 1993 "there were numerous witnesses that did not really want to be involved in this case"; in addition, Motley explained that many of the witnesses had pled guilty in their own cases, and by 2000 their terms of probation or incarceration would have expired).

Because Weaver has not met the "exceptionally high standards" to justify plea withdrawal when the government would be prejudiced by such withdrawal, Horne, 987 F.2d at 837; because Weaver has not shown that his plea proceeding was infected by harmful error; and because he has not asserted an "objectively reasonable argument that he is innocent," Cray, 47 F.3d at 1209, the Court finds that Weaver has not met the standard of manifest injustice governing withdrawal of guilty pleas.

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[21](...continued)
see Def. Closing at 34, and to the Court's failure to hold a prompt hearing on his § 2255 Motion, id. at 41-42, and thus cannot be held against him. However, the Court reminds defendant that he did not file his Motion to Vacate Sentence and Conviction until three and a half years after sentencing and six months after filing his civil malpractice suit against Mundy. Moreover, defendant's habit of filing numerous lengthy pleadings may itself have slowed the pace of his proceedings. In any case, the four evidentiary hearings held in this case far exceed the typical treatment for a § 2255 motion.

B. Defendant Has Suffered No Adverse Effect in this Case

Weaver's main argument for the reversal of his convictions is that Mundy's alleged conflict of interest after he entered his appearance for Rostenkowski, "seriously impaired [his] representation of Mr. Weaver." See Def. Closing at 4. Specifically, Weaver suggests that Mundy's conflict prevented him from renewing the defense request for a Rule 35(b) motion and that the value of Weaver's cooperation was called into question by Mundy's attorney who "attacked [Weaver's] credibility" in a meeting with the government prosecutors. Id. According to Weaver, this "tainted the government's later Rule 35(b) motion for a final and reduced sentence in a way that was difficult if not impossible to measure." Id. at 12. The Court disagrees with defendant's assertions.

1. The Majority of Weaver's Cooperation Centered on Congressman Kolter

While the Court acknowledges that, assuming Mundy was still representing Weaver, there was a conflict of interest in Weaver's case once Mundy accepted Rostenkowski as a client; it is not at all clear from the testimony of the government's attorneys who were investigating the House Post Office case that they would have recommended the defendant for a reduction of sentence in June of 1994, had Mundy approached them after the Rostenkowski indictment on May 31, 1994. In fact, the evidence weighs strongly against Weaver's assumption that a Rule 35(b) motion would have been recommended at that time. First, there was a feeling among the prosecutors that Weaver had already received a substantial break in his sentence. See Opp. to Motion to Disqualify at 5, quoting from 3/31/94 letter from Mundy to Weaver ("Motley feels you received a substantial break in your sentence. As you probably know, this is the feeling of most prosecutors.") Second, all of the witnesses who testified at the

four evidentiary hearings, aside from the defendant's own wife, questioned the weight of Weaver's assistance in the prosecution of Rostenkowski. See Tr. 12/13/99 at 35; Tr. 12/6/99 at 24, 27, 44-45, 65, 93.

It is clear that Weaver could have been a significant witness had Rostenkowski's case gone to trial and had he actually been asked to testify. However, as Campbell explained, "[the government was] still a long way from trial," and there was no way of knowing whether defendant would actually have been called as a witness at Rostenkowski's trial because Weaver was "an impaired witness . . . damaged goods, if you will."[22] Tr. 3/10/00 at 28-29. Moreover, there is no proof that had Weaver's attorney renewed the defense request for a Rule 35(b) motion, the government would have submitted that request to the Departure Committee.

See 3/10/00 at 107 (Assistant United States Attorney Larry Parkinson testified that the help that Weaver had provided, "simply that piece that related to Congressman Rostenkowski," was not significant enough, to warrant a recommendation for a

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[22]Campbell further explained, "He pleaded guilty to Obstruction of Justice among other things, and that means that he not only admitted his guilt to a felony offense, but he had admitted lying and getting other people to lie, and he admitted doing that in the context of a court proceeding, which is the very . . . context [in which] we would be asking the jury to believe him." Tr. 3/10/00 at 29. Similarly, Canan previously testified that "Mr. Motley made it quite clear that he viewed Mr. Weaver as – as we said in the trade at that time – 'damaged goods.' He had perjury matters. He had obstruction of justice matters. He was an attorney to boot. He was going to be a difficult witness for the government to sponsor. 12/13/99 Tr. at 43.

35(b) motion); see also Tr. 3/10/00 at 33-34 (Campbell testified that "if we had thought about it -- it would have surprised us that there wasn't one, that a request had not come in, but I can't say that [we] would have submitted it. We would have evaluated it, we would have thought about it. . . . it is possible that we would have submitted one then . . ., but I can't say it was [certain]."). In fact, Motley testified that Weaver's chances of getting a Rule 35(b) motion based on the information he provided about Congressman Rostenkowki were "extremely questionable." See Tr. 3/10/00 at 87-88. Motley explained that although the government had contemplated using Weaver as a witness if Rostenkowki went to trial, "there is a difference between being a witness and providing substantial assistance in the prosecution of another." Id. Therefore, there is no evidence that Weaver would have received his Rule 35(b) motion earlier had Mundy not entered his appearance for Rostenkowski.

Moreover, Weaver's argument that the value of his cooperation was diminished when Mundy sent his own attorney, Jacob Stein ("Stein"), to speak with the prosecutors on the "alleged" conflict of interest, Def. Closing at 12, is not borne out by the hearing evidence. Although Stein told the prosecutors that he did not believe that the United States would call Weaver as a witness at Rostenkowski's trial, the United States persisted in the argument that Mundy's representation of Rostenkowski did, in fact, present a conflict of interest in the Rostenkowski action. See Tr. 3/10/00 at 64. In fact, in October of 1994, the prosecutors not only filed a formal Motion to Disqualify Mundy from further representation of Rostenkowski; but a few weeks later the government delivered to chambers the Government's Ex Parte In Camera Submission in Support of its Motion to Reduce Sentence in Weaver's case, in which the government advised the Court of the extent and substance of Weaver's assistance. On this record, there is no evidence that the United States ever undervalued or altered its assessment of the value of Weaver's

cooperation as a result of Mundy's efforts to persuade the government that there was no conflict of interest.[23]

2. Defendant Was Never Guaranteed a Rule 35(b) Motion

Weaver claims that "he had a right to rely upon paragraph 14 of his plea agreement, and he had a right to effective assistance of counsel at that precise time." Def. Closing at 34. According to Weaver, since "that time has long passed," and the Court cannot restore those rights retroactively, the only available remedy for the breach is withdrawal of his plea and a reversal of his conviction. Def. Closing at 34.

However, paragraph 14 of the plea agreement clearly states that "Gerald W. Weaver has no right to compel or require that the United States will file" a Rule 35(b) motion. The express terms of this paragraph left the decision of whether or not to file such a motion entirely within the government's discretion. See Plea Agreement P 14 ("If the United States Attorney determines that Gerald W. Weaver II has provided substantial assistance in the investigation or prosecution of other persons, the United States Attorney, may, in his discretion, file motions under Title 18 U.S.C. Sec. 3553(e), and Rule 35(b), Federal Rules of Criminal Procedure advising the District Court of the assistance to law enforcement authorities. Gerald W. Weaver has no right to compel or require that the United States Attorney will file such a motion.") (emphasis added). There is no allegation by defendant, nor is there any evidence in the record to suggest that,

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[23]Furthermore, there is no evidence on the record that the "informal discussions" between the prosecutors and Mundy during the summer of 1994 actually resulted in what Weaver calls "a parade of prejudices and breaches of confidences." See Def. Closing at 24.

defendant did not understand this language.[24] In fact, the record shows that the plea agreement was reviewed in substantial detail and that Weaver expressed both understanding and willingness to sign the agreement. See Tr. 3/31/93 at 10-13; see also Tr. 3/10/00 at 80-81. On this record, defendant cannot claim any entitlement to a Rule 35(b) motion.

Since Mr. Weaver had no entitlement to such a motion and since there is no evidence that the motion would have been filed earlier had Mundy not entered his appearance for Rostenkowski, there is insufficient evidence of "adverse impact" in this case to justify a reversal of Weaver's convictions.

3. Reversal is Not Automatic

Weaver argues that reversal of his convictions "is automatic" since "the Mundy conflict of interest was never the subject of any inquiry, prompt or otherwise by the trial judge, contrary to the requirements of Fed. R. Crim. P. 44 and Wheat v. United States, 486 U.S. 153, 100 L. Ed. 2d 140, 108 S. Ct. 1692 (1988)." Def. Closing at 6, 21-26. This Court disagrees.

First, Rule 44(c), as written, concerns two or more defendants that have been jointly charged pursuant to Fed. R. Crim. P. 8, or have been joined for trial pursuant to Fed. R. Crim. P. 13. See Fed. R. Crim. P. 44(c). Similarly, the Wheat decision focuses exclusively on the issue of potential conflicts of interest where two co-defendants joined for trial are being represented by the

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[24]Defendant has explicitly acknowledged his understanding of this plea agreement. See Def. Reply to Government's Closing at 4 ("He certainly understood the plea as it was written . . . .")

same attorney. Weaver and Rostenkowski were not jointly charged, nor were they joined for trial.

Therefore, neither Rule 44(c) nor the Wheat decision has any applicability here.

Second, the remedy sought by the United States for Mundy's conflict of interest was his disqualification from further representation of Congressman Rostenkowski, not a withdrawal of Weaver's pleas. See Motion to Disqualify at 25; see also Tr. 3/10/00 at 24. A motion to disqualify is governed by entirely different legal standards from a motion to vacate, set aside, and reverse conviction. Without any evidence at all of adverse effect to Weaver's case, there is simply no basis for withdrawing his pleas and vacating his convictions.

Weaver would have this Court withdraw his pleas and vacate his convictions based upon nothing more than mere speculation that his sentence could possibly have been a month or two shorter.[25] There is no evidence to support Weaver's assertions. Considering the charges Weaver was facing if he went to trial and the evidence the government had against him, the Court finds

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[25]Weaver also argues that the Court is obligated to vacate his convictions in order to send the message that it does not condone breaches of legal ethics. The Court will not respond to this statement, except to remind Weaver that he himself was a licensed attorney who pled guilty to conspiracy to distribute a controlled substance, distribution of a controlled substance, and obstruction of justice. Perhaps, Weaver is not in the best position to be preaching about legal ethics.

Weaver's actual term of incarceration to be quite lenient.[26] Although the Court recognizes that a conflict of interest may have existed in Weaver's case, without any evidence of "adverse impact" the Court cannot simply grant an automatic reversal of this defendant's convictions. In the absence of any evidence of manifest injustice or adverse effect, the Court finds a withdrawal of defendant's guilty pleas and a reversal of his convictions unwarranted.[27]

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[26]Weaver's total imprisonment was less than seventeen months. This figure is less than what Mundy, prior to his alleged conflict of interest, requested at sentencing when he asked the Court to grant an additional one-point guideline reduction for Weaver's cooperation, see Tr. 6/30/93 at 29-31, and even lower than the sentence advocated by Bachner, whose allegiance and effectiveness have not been questioned, see Def. Response to Government's Rule 35(b) Motion (requesting a sentence of 18 months).

[27]Since there is no evidence of adverse impact, the Court also cannot accept the government's suggestion that Weaver's remaining term of supervised release be vacated. The Court understands that Weaver himself may have cured any potential prejudice by hiring a new attorney to petition the government for a Rule 35(b) motion. However, the role of this Court is merely to look for adverse impact, not to analyze how the adverse effect was avoided. Therefore, the fact that Weaver may have prevented his own prejudice does not change the Court's analysis. It is possible that Weaver may prevail in his malpractice case against Mundy's estate; this may be where his remedy lies. However, that is not at issue here. This is a case under 28 U.S.C. § 2255, and under those standards and the prevailing caselaw, the Court cannot find sufficient evidence of manifest injustice or adverse

(continued...)

III. CONCLUSION

For the foregoing reasons, defendant's Motion to Set Aside, Vacate, and Reverse Judgment of Conviction pursuant to 28 U.S.C. § 2255 is denied in its entirety. An order will accompany this opinion.

June 7th, 2000

Thomas F. Hogan

United States District Judge

ORDER

In accordance with the accompanying memorandum opinion, it is hereby

ORDERED that defendant Gerald W. Weaver II's Motion to Set Aside, Vacate, and Reverse Judgment of Conviction, pursuant to 28 U.S.C. § 2255 is DENIED. It is further

ORDERED that civil action number 97-370 is DISMISSED WITH PREJUDICE. And it is further hereby

ORDERED that this Order constitutes the final appealable order in this case.

June 7th, 2000

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[27](...continued)
effect to warrant a withdrawal of Weaver's pleas and a reversal of his convictions.

Thomas F. Hogan

United States District Judge

United States Court of Appeals
For The District of Columbia Circuit

No. 00-3064 September Term, 2001
92cr00453-01

Filed On:

United States of America
Appellee

v.

Gerald W. Weaver, II,
Appellant

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA
CIRCUIT
FILED: NOV 19 2001
CLERK

BEFORE: Henderson, Randolph and Rogers, Circuit Judges

ORDER

Upon consideration of appellant's motion for leave to exceed the page limits, and the lodged petition for rehearing filed October 19, 2001, it is

ORDERED that the motion for leave to exceed the page limits be granted. The Clerk is directed to file the lodged petition. It is

FURTHER ORDERED that the petition for rehearing be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

United States Court of Appeals
For The District of Columbia Circuit

No. 00-3064

September Term, 2001
92cr00453-01

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Gerald W. Weaver, II,
Appellant

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA
CIRCUIT
FILED: NOV 19 2001
CLERK

BEFORE: Ginsburg, Chief Judge; Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel, and Garland,* Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

* Circuit Judge Garland did not participate in this matte